JAI BIN ADAM @ ZAINUDDIN BIN ADAM

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, MIRI
TUAN RICHARD MALANJUM J
[CRIMINAL APPEAL NO. 11 OF 1994]
20 JUNE 1995

***CRIMINAL LAW**: Charge under s. 4(c) Prevention of Corruption Act 1961 - Appeal against conviction - Whether an offence under s. 4(c) was disclosed - Consideration of the ingredients of the offence under s. 4(c) - Trial Judge making findings of fact - Whether appellate Court could interfere - Whether appellate Court should interfere - Consideration of the evidence adduced as a whole - Whether there were grounds for the appellate Court to interfere with the decision made by the trial Judge.*

***CRIMINAL LAW**: Charge under s. 4(c) Prevention of Corruption Act 1961 - Appeal against sentence - Whether sentence manifestly excessive - Whether there were extenuating circumstances - Principles applicable on sentencing.*

***CRIMINAL PROCEDURE**: Charge under s. 4(c) Prevention of Corruption Act 1961 - Trial conducted over a period of three years - Further delay of three years for grounds of judgment to be supplied - Whether delay prejudicial to the accused - Consideration of the decision in Tan Hun Wah v. Public Prosecutor - Whether applicable to the facts of the present case.*

***EVIDENCE**: Charge under s. 4(c) Prevention of Corruption Act 1961 - Prosecution witness alleged to be accused's accomplice - Appeal against conviction - Failure by trial Judge to warn herself of the danger of convicting on accomplice's evidence - Whether prosecution witness in fact an accomplice - Whether there was in fact corroboration of alleged accomplice's evidence.*

Three charges under s. 4(c) of the Prevention of Corruption Act 1961 (the Act) were preferred against the accused who was at all material times the Senior Health Inspector attached to the Medical Department Miri in charge of the Rural Health Scheme. The Medical Department initiated a project to supply latrines, water tanks and other health related materials to the rural folk and the accused was in charge of confirming or certifying that the goods and the services had been rendered before payment was made. The prosecution alleged that no tin bars were supplied and that there were short deliveries of water tanks to certain areas and in the circumstances preferred the charges under the Act against the accused.

The accused appealed against his conviction and sentence.

Held:

[1] Following the case of *Yahya Abdullah v. Public Prosecutor,* to succeed in securing a conviction on a charge under s. 4(c) of the Act the prosecution has to prove that the accused used a document in respect of which his principal was interested; the document contained a statement which was false in a material particular; the accused knew the statement was false in a material particular and he intended it to mislead the principal

and when the accused used the document he knowingly used such document with intent to deceive his principal.

[2] There was no dispute that the appellant was the agent of the Government of Malaysia, his principal. There was also no challenge that before the invoices could be paid, the appellant as Section Head, had to confirm that the goods or services had been rendered and it was not in dispute that the appellant confirmed the invoices by certifying on them. By certifying the invoices and thereby qualifying them for payment, the appellant had used the invoices in which his principals were interested. Furthermore in the light of the evidence adduced there was no reason to interfere with the learned Sessions Court Judge's finding that the invoices contained statements which were false in a material particular.

[3] As for the argument that the prosecution witness PW22 was an accomplice, it was not rebutted that PW22 was an illiterate person who came to the appellant for help. The invoices were blank when they were handed to the appellant and the evidence shows that it was the appellant who filled them in. There was nothing in the evidence which indicated that PW22 had participated in the scheme voluntarily and as PW22 was merely complying with the directions of the appellant, he could not be considered to be an accomplice. Even assuming that PW22 was an accomplice, there was ample corroborative evidence to his testimony in the evidence of PW23, PW24, PW13 and the documentary evidence.

[4] In the circumstances, considering the evidence as recorded in the appeal record, the learned trial Judge was quite correct in coming to the conclusion that it had been sufficiently established beyond any reasonable doubt that the appellant knew that the material particulars in the invoices were false, that he intended to mislead his principal and that he knowingly used the invoices with intent to deceive his principal.

[5] A reading of *Tan Hun Wah's* case does not support the proposition advanced by Counsel for the appellant that delay *per se* should vitiate the proceedings. Unfairness and prejudice should be sufficiently established. In the present case the learned Counsel had failed to show that the delay either in the trial or in the supply of the grounds of judgment had prejudiced his client. Furthermore the facts and circumstances of the present case do not allow the application of the principal on the effect of delay as enunciated in *Tan Hun Wah's* case as the present case primarily involved documentary evidence and the oral evidence and demeanour of witnesses did not play a vital role.

[6] It is settled law that an appellate Court should only interfere with a sentence imposed by a trial Court if it is wrong in law or if, in the circumstances of the case, it is manifestly excessive. Although the question of whether or not the appellant had benefitted from the scam was relevant, the overriding consideration was the public interest. There was evidence adduced of the role played by the appellant which resulted in payments being made by the Medical Department for an item not delivered and services not rendered. There was also an attempt to avoid blame when exhibit P17 was copied into exhibit P18 for no obvious reason. Furthermore an illiterate person was used as the front to perpetuate the abuse on the project, the success of which was entrusted to the appellant. In the premises, as there were no extenuating circumstances, it could not be said that the sentences imposed upon the appellant were manifestly excessive.

[Appeal against conviction and sentence dismissed].

Cases referred to:
Yahya Abdullah v. Public Prosecutor [1991] 1 CLJ 398 ***(foll)***
R. v. Sang [1979] 2 All ER 1222 ***(refd)***
Goh Ah Yew v. Public Prosecutor [1949] MLJ 150 ***(refd)***
Tan Hun Wah v. Public Prosecutor & Anor. [1994] 1 MLJ 384 ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 6, 39A, 39B
Prevention of Corruption Act 1961, s. 4(c)

For the appellant - Charles Kanavathi; M/s. C.M. Kanavathi & Co.
For the respondent - Ahmad Bachee; DPP

JUDGMENT

Richard Malanjum J:

This is an appeal by the appellant against his convictions and sentences on the three charges preferred against him under s. 4(c) of the Prevention of Corruption Act 1961 (PCA), namely:

Amended 1st charge

That you, on or about 21 March 1983 at Divisional Office, Miri Fourth Division in the State of Sarawak being an agent of the Government of Malaysia, namely, Senior Health Inspector did knowingly use with intent to deceive your principal, a document, to wit Invoice No. 1162 dated 21 March 1983 for the supply of 2 consignments of 150 kgm each of tin bar at RM25 per kgm amounting to RM7,500 in respect of which your principal was interested and which contained a statement which is false in material particulars in that you had certified that "the above stores have been received and brought into immediate use" when in actual fact, there was no such supply of the said articles and which to your knowledge was intended to mislead your principal and that you have thereby committed an offence punishable under s. 4(c) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act 57).

Amended 2nd charge

That you, on or about 30 March 1983 at Divisional Medical Office, Miri, Fourth Division in the State of Sarawak, being an agent of the Government of Malaysia, namely Senior Health Inspector did knowingly use with intent to deceive your principal a document, to wit, Invoice No. 1163 dated 30 March 1983 for the transportation and handling of water tanks namely:

1. To transport complete water tanks from Miri Ke Rh. Abon - 50 innos of RM32 each - RM1,600

2. To transport complete water tanks from Miri to Kg. Masjid Tiris - 138 innos at RM30 each - RM4,140

in respect of which your principal was interested and which contained a statement which is false in material particulars in that you certified that "the work has been satisfactorily completed" when in actual fact, there was no supply of 50 water tanks to Rh. Abon costing RM1,600 and only 114 water tanks were supplied to Kg. Masjid Tiris, thus making a false claim for 74 innos of water tanks valued at RM2,320 which had not been supplied and which to your knowledge was intended to mislead your principal and that you have thereby committed an offence punishable under s. 4(c) of the Prevention of Corruption Act 1961 (Laws of Malaysia Act 57).

Amended 3rd Charge

That you, on or about 10 March 1984 at Divisional Medical Office, Miri Fourth Division in the State of Sarawak, being an agent of the Government of Malaysia namely senior Health Inspector did knowingly use with intent to deceive your principal, a document, to wit, Invoice No. 1167 dated 10 March 1984 for the transportation and handling of water tanks namely:

1. To Rh. Lassan - 72 innos at RM35 each ... RM2,520
2. To Rh. Thomas - 46 innos at RM35 each ... RM1,610
3. To Rh. Gindi - 70 innos at RM45 each ... RM3,150

RM7,280

He was convicted on all the three charges by the Sessions Court Miri on 15 December 1990 and was sentenced to 18 months imprisonment on each charge but to run concurrently. He has been on bail pending the hearing of his appeal.

The appellant says that he is dissatisfied with the judgment of the trial Sessions Court Judge on the grounds (and I quote from the petition of appeal dated 21 March 1994):

(a) The learned trial Judge erred in law in convicting the appellant as the evidence adduced by the prosecution did not disclose an offence under s. 4(c) of the Prevention of Corruption Act.

(b) The learned trial Judge erred in law in that she took into consideration and was influenced by the facts of the case which contain allegations which were not substantiated by the evidence adduced by the prosecution.

(c) The learned trial Judge erred in law in failing to call for an explanation on the full significance of the documentary exhibits.

(d) The learned trial Judge did not consider on (sic) address herself that (PW22) Mr. Lim Kok Poh is an accomplice and that to convict on his evidence alone is unsafe.

(e) The learned trial Judge erred in law and in fact in failing to adequately consider the defence evidence (sic) on the balance of probabilities especially the fact as to whether the defence as a whole had raised a reasonable doubt as to the truth of the prosecution case.

(f) The learned trial Judge had erred in law and in fact when she stated at p. 55 of the judgment that she does not believe the truth of the accused defence and upon such finding she had stated the defence had not raised any reasonable doubt against the prosecution case.

(g) That the conviction by the learned Judge was wrong in law, unreasonable and against the weight of evidence and cannot be supported having regard to the evidence adduced.

When the hearing of this appeal first came up learned Counsel for the appellant applied to have another ground to be added as (h) and to read as:

(h) that the delay in the trial and in providing the grounds of judgment to the petitioner has prejudiced him.

The learned Deputy Public Prosecutor agreed to the application provided that he could be given time to consider the additional ground. That was duly granted and the additional ground was therefore allowed.

Briefly, the appellant was at all material times the Senior Health Inspector attached to the Medical Department Miri. He was in charge of the Rural Health Scheme. Between 1982 and 1984 the Medical Department initiated the project to supply latrines, water tanks and other health related materials to the rural folks with the view of preventing and controlling the outbreak of diseases in the rural areas. The materials were either purchased or constructed and thereafter transported to the respective areas. The mode of awarding the works to private contractors was by way of calling for quotations from potential contractors. Decisions on the quotations were made by Quotation Board composing of the Divisional Medical Officer (DMO), the Administrative Assistant in the Medical Department, Miri and the relevant section heads which required the services. Thus, in the instant case the appellant was a member of the board when it decided on the quotations of tin bars supply and transportation of the water tanks. Successful contractors were required to provide the goods or services and upon completion payments were made. But before any payment was done, it had to be confirmed by the section head. In the present case, on the supply of tin bars and transportation, the appellant had to confirm or certify that the goods and the services had been rendered before payments could be effected.

It was the case for the prosecution that no tin bars were supplied and that there were short deliveries of water tanks to certain areas. Hence the charges were preferred against the appellant.

At the hearing proper of this appeal learned Counsel for the appellant divided the grounds of appeal against convictions as reproduced hereinabove into three groups, namely, the first group constituting grounds (a), (b), (c) and (d), the second group consisted of grounds (e), (f) and (g) and ground (h) as the third group. There is also an appeal against the sentences imposed and the ground given reads (as I also quote from the petition of appeal):

> 3. The sentence is manifestly excessive having regard to the nature, circumstances and facts of the case especially the mitigating factors in the appellant's favour.

I will deal with the appeal against the sentences after I have dealt with the appeal against the convictions.

Now, before proceeding to consider the grounds of appeal, perhaps I should briefly deal with the ingredients of s. 4(c) of the PCA. In the case of *Yahya Abdullah v. Public Prosecutor* [1991] 1 CLJ 398 his Lordship K.C. Vohrah J summed up the ingredients as thus: at p. 399.

To sum up, to succeed in securing a conviction on a charge under s. 4(c) the prosecution would have to prove:

1. that the accused used a document in respect of which his principal was interested;
2. that the document contained a statement which was false in a material particular;
3. that the accused knew that the statement was false in a material particular and that he intended it to mislead the principal;

4. that when the accused used the document he knowingly used such document with intent to deceive his principal.

I have no reason to differ from what was said by his Lordship in that case.

1. On Convictions

(a) Grounds (a) (b) (c) and (d) - the first group:

From the submission of the learned Counsel for the appellant this first group covered all the convictions. And he contended that the prosecution failed to disclose any offence under s. 4(c) of the PCA for the following reasons which may be summarised as follows:

(i) that the appellant did not knowingly use the invoices which were the subject-matter of the charges;

(ii) that the appellant only certified the said invoices after making oral enquiries from the relevant persons;

(iii) that there were no proper records kept pertaining to the delivery of the water tanks as it was based on trust and was done in a friendly manner;

(iv) that the allegation of non-delivery of tin bars was inconsistent with the fact that water tanks were constructed even though the record showed that the supply of tin bars had run out;

(v) that there was no query from the Medical Department Headquarters in Kuching on any short delivery of water tanks although there was a query on the zinc sheets;

(vi) that the records relied upon by the prosecution were unilateral records without any counter-acknowledgment;

(vii) that the learned trial Sessions Court Judge did not state any reason for believing the main witness for the prosecution - PW22 - Lim Kok Poh; and

(viii) that the trial Sessions Court Judge did not even consider that PW22 might be an accomplice and thus failed to warn herself of the danger of convicting the appellant on accomplice's evidence.

In reply, learned Deputy Public Prosecutor submitted that there were sufficient evidence established on the charges and that the defence of the appellant was only one of mere denial. The learned Deputy pointed out that the trial Court made findings of facts as follows:

(a) that the documents were filled in by the appellant;

(b) that there was no supply of tin bars; and

(c) that the documents namely, Exhs. P26, P27 and P28, pertaining to the supply of tin bars and the transportation and delivery of water tanks were false.

On these findings of facts the learned Deputy contended that this Court as an appellate Court should be slow to interfere. With regard to the knowledge of the appellant on the falsity of the documents and the intention of using them to mislead his principal, it was

submitted by the learned Deputy that it was also the finding of fact of the trial Court that the appellant knew the falsity of the documents and that he intentionally used them to deceive his principal.

Having considered the judgment of the learned Sessions Court Judge, the evidence adduced and the submissions of the learned Counsel for the appellant and the learned Deputy, I find it baseless to say that the convictions cannot stand by reason of this first group of grounds of appeal.

Firstly, there was no dispute that the appellant was the agent of the Government of Malaysia, his principal.

Secondly, there was no challenge that before the invoices namely, Exhs. P26, P27 and P28 (hereinbefore and after referred to as "the invoices") could be paid, the appellant, as the section head, had to confirm that the goods or services had been rendered. Thus, without the confirmation from the appellant those invoices would have been useless for the purposes of payments. And it was also not in dispute that the appellant confirmed by certifying on them. Upon certifications by the appellant payments could be made for the invoices and that the Government of Malaysia, the principal of the appellant, was interested in the invoices as payments on them had to be effected. But it remains whether the appellant used the invoices. Learned Counsel for the appellant argued that the appellant only certified them and did not use them. But from the evidence and the finding of fact by the learned trial Sessions Court Judge it was the appellant who kept the invoices and also submitted them to the Medical Department for payments. And that being a question of fact, I do not think I should interfere. I find no reason to do so. Further, as it was obvious that the appellant certified the invoices thereby qualifying them for payments, in my view, by so doing he had used the invoices which his principal were interested.

Thirdly, it was also found as facts by the learned trial Sessions Court Judge that the invoices contained statements which were false in material particulars. I have considered the findings in the light of the evidence adduced and I concur with them. Learned Counsel contended that the Tally Card Books (Exhs. P17 and P18) should not be relied upon as they did not record the true movement of the water tanks from the store. Yet in his own evidence the appellant said that he also relied on Exh. P17 to ensure that deliveries of tanks were made. Furthermore, the appellant or his Counsel at the trial did not dispute the admissibility of the documents which they should have done so if the prejudicial effects out-weighed their probative values. In *R. v. Sang* [1979] 2 All ER 1222 at pp. 1231j - 1232a Viscount Dilhorne said this:

> That a Judge has such a discretion in some circumstances is now established beyond all doubt. He can refuse to allow the cross-examination of an accused as to character when the provisions of the Criminal Evidence Act 1989 would permit it and he can refuse to allow the prosecution to call evidence tending to prove the commission of offences other than those charged. In my opinion these are not the only cases in which he has that discretion. He can in my opinion disallow the use in any trial of admissible relevant evidence if in his opinion its use would be accompanied by effects prejudicial to the accused which would outweigh its probative value.

Thus, I find no merit in the submission of the learned Counsel for the appellant on this issue.

Moreover, in his defence the appellant failed to rebut the falsity of the contents of the invoices other than saying that he depended on the information from others. But if that was true, then the appellant did not explain the need to create Exh. P18 on his instruction and except for his bare denial he showed nothing to rebut or negate the testimony of PW15 on that point. Learned Counsel tried to create an issue on the answer of PW15 under cross-examination that Exh. P17 could not be a correct record of the number of water tanks in the store. But he did not highlight the earlier part of the testimony in that PW15 said that he was only to issue water tanks and not to receive for the store. Thus, even if Exh. P17 may not be a correct record as to the number of water tanks in the store at any one time, the record of issuance should not be in question. And that is the relevant point in this present case.

I also find that the appellant did not explain satisfactorily as to why he could not have known of the actual number of water tanks delivered to certain longhouses since contributions for them from the residents of the longhouses were handed over to him. This was in the testimonies of PW17 - Anthony Langun ak Pek, PW19 - Shamsuddin bin Hamdani and PW20 - Anthony ak Tagol.

Fourthly, the need to recopy Exh. P17 to Exh. P18 on the instruction of the appellant only went to show that the appellant must have known that something was not regular in the invoices. In fact according to PW15 he was also instructed to make some alterations to the figures in Exh. P18. And it was not rebutted by way of any evidence other than a bare denial that the appellant instructed PW16 - Roland Gani ak Jampong to take Exh. P17 to him from the drawer of PW15 as he wanted to check the book. Here of course there was an inconsistency between the evidence of PW15 and PW16 as to which book was taken. PW15 said that it was Exh. P18 but PW16 insisted it was Exh. P17 and that he was not sure if he took Exh. P18. But in my view that inconsistency should not negate the fact that the appellant caused to be taken either one or both of the books for his checking in the absence of PW15 who should have been the proper person to refer to as he was keeping the record.

Furthermore, the learned trial Session Court Judge also found as a fact that the appellant took an active role in ensuring that cheques payable to PW22, in particular Exh. P13, Exh. P14 and Exh. P15, were collected from the Treasury (JAN) and passed on to him. Again the appellant gave only a bare denial in respect of Exh. P13 and Exh. P15 but he agreed that he gave to PW22 Exh. P14.

Having perused and considered the evidence as recorded in the appeal record, I agree with the finding of the learned trial Sessions Court Judge that it had been sufficiently established beyond any reasonable doubt that the appellant knew that the material particulars in the invoices were false and that he intended to mislead his principal. Further, that he knowingly used the invoices with intent to deceive his principal.

Fifthly, pertaining to the submission that there was inconsistency in the evidence on the non-delivery of tin bars, it was obvious that the learned trial Sessions Court Judge believed the evidence of PW22 that he did not supply any tin bars. It was not in dispute that PW22 was only dealing in transportation services. And according to the appellant PW22 delivered the tin bars to the office in March 1983. But if that was the case then surely some other staff would have witnessed the delivery. Yet no one was asked on this pertinent point. Learned Counsel argued that there must have been delivery of tin bars as the construction of water tanks went on up to April 1984 whilst on record tin bars were no longer available by September 1983. I find no merit in the argument. Foremost it was too presumptuous.

Further, the alleged delivery was in March 1983 and the record showed that in September 1983 tin bars were no longer available. So even if the claim of delivery was true the supply would have been exhausted by September 1983. Thus, I find no relevance in the argument that in as late as April 1984 water tanks were still being constructed.

Sixthly, the learned Counsel submitted that PW22 was an accomplice yet the learned trial Sessions Court Judge did not warn herself of the danger of convicting the appellant on accomplice's evidence. Now I agree that there was nothing in the judgment which indicated that the learned Sessions Court Judge had warned herself of such a danger. But in the first place the issue of whether or not PW22 was an accomplice did not arise in the mind of the learned Sessions Court Judge. And I think rightly so. From the evidence adduced it was obvious that PW22 only followed the directions of the appellant. It was not rebutted that indeed PW22 was an illiterate person as even the appellant said that he (PW22) would come to him for help. The invoices were blank when they were given to the appellant. And it was shown in the evidence adduced that the appellant filled them. I found nothing in the evidence which could indicate that PW22 had participated in the scheme voluntarily. Rather, he was merely complying with the directions of the appellant. I have no hesitation to say that in the circumstances of this case PW22 could not have been an accomplice. (See *Goh Ah Yew v. Public Prosecutor* [1949] MLJ 150).

Incidentally, on perusal of the submission of the learned Counsel for the appellant during the trial indicated that he brought up the issue of PW22 being an accomplice only on the allegation of handing over the money to the appellant after the cheque had been encashed. But the charges preferred against the appellant were not for accepting gratification but under s. 4(c) of the PCA. Thus, the question of PW22 being an accomplice when he handed the money to the appellant should not arise as a crucial issue.

Even assuming that PW22 was an accomplice, in my judgment, there was ample corroborative evidence to his testimony, e.g., the evidence of PW23, PW24, PW13 and the documentary evidence. There was also nothing shown that a miscarriage of justice would occasion for the failure to consider whether PW22 was an accomplice.

Seventhly, on the point that the learned trial Sessions Court Judge did not give her reasons for believing PW22, I think it should be a matter of reading her judgment as a whole. She might not have specifically outlined her reasons but if the judgment is read as a whole it is obvious that she believed PW22 on the strength of the other evidence adduced and the circumstances of this case. Moreover, the bare denial of the appellant did not help him.

And lastly, as regards the absence of query from Kuching office, I find it difficult to see the relevance in this case. There was nothing shown that the Kuching office was given all the correct information so as to be able to monitor the number of tanks delivered. Surely, the Kuching office had also to depend on what was reported by the appellant and by those under his supervision pertaining to the project. There was also no evidence that the Kuching office was given copies of the invoices. Thus, I find no merit in that contention.

(b) Grounds (e), (f) and (g) - second group

On this second group of the grounds of appeal it was the contention of the learned Counsel for the appellant that all the convictions could not stand for the following reasons, in summary:

(i) that the learned trial Sessions Court Judge did not consider adequately the defence on the balance of probabilities, i.e., that the defence as the whole might have raised a reasonable doubt;

(ii) that the judgment was not a reasoned judgment; and

(iii) that no reason was given as to why the appellant should be disbelieved.

In view of what I have stated when dealing with the first group of the grounds of appeal I do not think this second group has any merit. As an appellate Court this Court can also consider the evidence adduced during the trial and having done so it is in my judgment that there is no reason to interfere with the conclusions and findings of the learned trial Sessions Court Judge.

In fact it is not wholly correct to say that the learned trial Sessions Court Judge did not consider the evidence adduced but merely repeated them. She went through the evidence and made her findings based on them. There may be no obvious cross-reference with the evidence of the appellant. But then if one were to consider the testimony of the appellant as a whole the irresistible conclusion is that it is substantially a bare denial of any involvement. It was never satisfactorily explained as to why he gave literally a special treatment to PW22 by informing him of the award, ensuring the cheques were collected, handed to him and passed on to PW22 and that he took the trouble of filling the blank invoices. And yet in his own evidence the appellant said that his relationship with PW22 was normal.

It was also not rebutted in any material particular the testimony of PW15, especially on the point that the appellant instructed PW15 to recopy Exh. P17 into Exh. P18 and to do the alterations. I found no convincing explanation from the testimony of appellant as to the need of instructing PW15 to create Exh. P18.

Perhaps learned Counsel for the appellant was looking for a judgment written in a style that he wanted. But each person has his or her own style of expressing his or her own decision. And I do not think the learned trial Sessions Court Judge should be faulted for giving her decision in her own style. The crucial point is whether or not the evidence adduced as a whole supported her decision that the prosecution had established its case beyond any reasonable doubt. Having considered the evidence adduced as a whole I have no reason to disagree with the decision.

(c) Ground (h) - third group

This ground came about in view of the decision of the then Supreme Court in *Tan Hun Wah v. Public Prosecutor & Anor*. [1994] 1 MLJ 382.

In that case the appellants were convicted of drug trafficking namely, raw opium, under s. 39B of the Dangerous Drugs Act 1952 and were sentenced to death. They were arrested in 1984 and had been on remand up to 30 October 1988 when they were convicted. The trial was spread over a period of approximately nine months and six days due to the numerous adjournments. There was also a delay of about three years and three months before the trial Judge's grounds of judgment were supplied in February 1992. The main issue before the then Supreme Court was whether the delays in the trial and the supply of the grounds of judgment had prejudiced the appellants and if so, what should be the remedy.

In coming to its decision the Supreme Court held that not every form of delay should vitiate the whole proceeding. Each case has to be considered on its facts.

This was what his Lordship Mohamed Azmi SCJ said in that case at p. 391:

> Where prejudice or unfairness had been sufficiently established, we agreed with and adopted the principle enunciated in the authorities cited before us on the effect of excessive delay not only in the supply of grounds of judgment but also delay in the trial itself. If the facts of the case so warrant, where there is a long delay in the supply of the grounds of judgment, an appellate Court would readily accept the allegation of prejudice on the basis that there is every likelihood not only that the trial Judge's impression on demeanour of witnesses would be blurred, but also the delay would increase the chances of omission on the part of the trial Judge to deal with material facts and issues in the grounds of judgment, which ought to have been favourable to the appellants. Such danger would of course be increased by manifold, when, as in the present case, the trial itself was conducted by instalments over a long period.

Ultimately, on the facts of that case, the then Supreme Court found prejudice to have been sufficiently demonstrated from the notes of evidence and the grounds of judgment as a result of the delays not only in the trial itself but also in supplying the grounds to the appellants or their solicitors. In particular, the Court was of the view that the fatal omission by the trial Judge to consider the arrest of one Akuaili Singh and the failure by the prosecution to call him as a witness or to offer to the defence had prejudiced the appellants. Accordingly, the convictions under s. 39B and the death sentences were set aside and substituted with one under s. 6 of the same Act as the Court found ample evidence of the appellants being in possession of the raw opium. They were therefore sentenced to life imprisonment with six strokes under s. 39A of the same Act.

In the instant case, the charges preferred against the appellant were under s. 4(c) of the PCA. He was not in custody before the convictions. He was first charged in Court in March 1986. Trial commenced on 8 August 1988 before the Sessions Court Judge, the late Mr. Joseph K.T. Wong with Encik Ghani bin Daras for the prosecution and Mr. Angking Embah for the appellant. It was only for one day. The hearing continued on 30 January 1990 before another Session Court Judge for one day as well. At that time the prosecution was conducted by Encik Nasaruddin bin Mohd. Nor while Mr. Ivan Ong appeared for the appellant.

Then on 26 March 1990 hearing resumed before the same coram and with the same prosecutor. But the appellant had a different defence Counsel, in the person of Mr. Charles Kanavathi. During that time Mr. Kanavathi made two applications, namely, for the notes of proceeding and to recall for cross-examination all the 4 witnesses who had given evidence earlier. Hearing was therefore adjourned to the next day, 27 March 1990 when the hearing proceeded until 30 March 1990. On the application of the defence Counsel the hearing was adjourned to 9 April 1990. But on the resumed hearing PW15 could not come in view of his inability to get an air ticket from Sibu. And the prosecution could not call another witness as the defence Counsel wanted to cross-examine PW15 first. As a result the hearing was adjourned to the next day, 10 April 1990. Hearing proceeded to 11 April 1990 when it was abruptly adjourned to 18 April 1990 as the learned trial Sessions Court Judge was not well. From 18 April 1990 the hearing continued until 21 April 1990 when it was again adjourned by the Court to 16 July 1990. But on 16 July 1990 the hearing could not go on as the defence Counsel was engaged in another case in the High Court Sibu. Hearing was therefore adjourned to 17 July 1990 until 20 July 1990 when the prosecution concluded its case after calling 24 witnessess. On the application of the defence Counsel in order to enable him to prepare his submission of no case to answer the hearing was therefore adjourned to 25 July 1990. On 26 July 1990

the defence was called. But the hearing could not proceed as PW1 whom the learned defence Counsel wished to recall was on course overseas. The hearing was therefore adjourned to 2 October 1990 and continued to 3 October 1990 when the defence case closed. The prosecution and the defence asked for time to prepare their final submissions and hearing was therefore adjourned to 5 October 1990. On 15 December 1990 oral judgment was delivered convicting the appellant of all the charges preferred against him and he was subsequently sentenced.

Now, as can be seen from the sequence of the proceeding, the delay was not entirely on the Court. Adjournments were also made either on the applications of the defence or the prosecution. At least 3 hearing days were vacated due to the applications by the defence out of the total of 25 days taken up by this case. And unfortunately on adjournments the new dates were not given sooner. Perhaps this was due to the fact (which I should take judicial notice of and which was pointed out to the learned Counsel for the appellant during the hearing of this appeal) that there was and is only one Sessions Court Judge in the Miri Registry who was and is also required to go on circuit to Bintulu and Limbang on almost monthly basis.

Anyway, after the oral judgment was delivered a notice of appeal was lodged. But the notes of proceeding only came out on 11 March 1994 which the learned Counsel for the appellant claimed to be incomplete as some documents were missing. Be that as it may, he did file the petition of appeal on 21 March 1994.

It was the delay of 3 years for the trial to complete and a further delay of 3 years for the grounds of judgment to be supplied which became the thrust of the contention of the learned Counsel for the appellant when submitting on ground (h). He seemed to think that the delay *per se* should vitiate the proceeding in this case. But my reading of *Tan Hun Wah's* case (*supra*) does not support that contention. Unfairness and prejudice should be sufficiently established. In the instant case the learned Counsel for the appellant failed to show that the delay either in the trial or in the supply of the grounds of judgment had prejudiced his client. Nothing was pointed out from the notes of proceeding or the grounds of judgment indicating that a fatal omission was committed which could be attributed to the delay as in the case of *Tan Hun Wah* (*supra*).

Furthermore, I do not think the facts and circumstances of this instant case allow the application of the principle (i.e., on the effect of delay) as enunciated in *Tan Hun Wah's* case. Here it is a case under s. 4(c) which involves documentary evidence while in *Tan Hun Wah's* case oral evidence of witnessess played a vital role. Thus, the issue pertaining to the demeanour of witnesses does not play a leading role. In any event, learned Counsel for the appellant did not highlight in his submission before this Court which of the witnesses called had his or her demeanour not taken into account by the learned trial Sessions Court Judge.

For the foregoings I also find no merit on ground (h) of this appeal.

Accordingly, the inevitable conclusion of this appeal against the convictions on the three charges preferred against the appellant, is that it must be dismissed. And I do so and hereby affirm the decision of the learned trial Sessions Court Judge on all the 3 convictions.

2. On Sentence

The learned Counsel for the appellant submitted that the sentence of 18 months on each conviction was manifestly excessive. Further, he argued that the only evidence of any benefit derived was the oral testimony of PW22. In addition, he said that the appellant had resigned from his post as he could no longer stand the pressure although he was never interdicted prior to his resignation.

In considering this aspect of the appeal I bear in mind that it is settled law that an appellate Court should only interfere with a sentence imposed by a trial Court if it is wrong in law or in the circumstances of the case it is manifestly excessive. Obviously, the appellant is only relying on the excessiveness of the sentence in this instant case. But from the submission of the learned Counsel for the appellant I am not convinced that the sentences imposed upon the appellant is manifestly excessive in the circumstances. In fact there was no extenuating circumstance which was pointed out to this Court.

As to whether or not the appellant had benefited from the scam, no doubt, may be relevant. But the overall effect and public interest must be given the overriding consideration. Here the project was meant to help the rural folks so that diseases could be prevented or controlled. The money spent belonged to the tax-payers and therefore it should be properly accounted for. It is a mandatory obligation of any public officer to ensure that projects under-taken by the Government and intended for the unfortunates should achieve their targets in terms of purposes and costs. Any dereliction of duties whereby losses are incurred and which could have been avoided if not for the actions of the officer, should be met with a meaningful punishment upon the officer being found guilty.

In the present case, evidence was adduced of the role played by the appellant which resulted in payments being made by the Medical Department for an item not delivered and services not rendered. There was also an attempt to avoid the blame with Exh. P17 was recopied into Exh. P18 for no obvious reason. Furthermore, an illiterate person was used as the front to perpetrate the abuse on the project which the appellant was entrusted for its success. Surely, he must now face the consequences. Let it be known to would-be offenders that greed will lead them to the clanging of the prison gates. And that is the destiny of the appellant in this case as I dismiss his appeal against the sentences imposed and affirm the order of the learned trial Sessions Court Judge. The appellant is to commence serving his sentences as from today.